

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

LEGAL ASSISTANCE CORPORATION OF  
CENTRAL MASSACHUSETTS

Employer<sup>1</sup>

and

NATIONAL ORGANIZATION OF LEGAL SERVICES  
WORKERS (NOLSW), UAW LOCAL 2320, AFL-CIO

Union-Petitioner

Case 1-UC-789

**DECISION AND CLARIFICATION OF BARGAINING UNIT<sup>2</sup>**

The Employer is a private non-profit corporation that provides representation to low-income and indigent parties in the areas of housing law, family law, and elder law, as well as welfare and social security disability benefits. The Union-Petitioner has represented the Employer's employees since 1992, when it was certified. The most recent collective-bargaining agreement between the Employer and the Union describes the Unit as follows:

All permanent and long-term temporary full-time and permanent  
And long-term temporary part-time senior attorneys, staff attorneys  
(whether or not they have passed the bar), senior paralegals, paralegals,  
clerical clerks, secretaries, and receptionists employed by the Employer  
at its Worcester, Massachusetts location, but excluding the Executive  
Director, the Deputy Director, the Litigation Director and the Advocacy  
Coordinator(s), Office Manager, confidential employees (Fiscal Assistant,  
Executive Secretary), Guards and supervisors (Senior Supervising Attorney(s),  
Managing Secretary) as defined by the Act.

There are currently about 19 attorneys and 4 paralegals in the bargaining unit.

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

The Union-Petitioner seeks to include the new position of Website Project Manager in the unit that it represents. The Union contends that the position is neither supervisory nor managerial and that the position shares a community of interest with unit employees. The Employer contends that the position is managerial, and that, based upon the Website Project Manager's authority to responsibly direct, evaluate, and train employees, this position should be excluded from the Unit as a statutory supervisor. Finally, the Employer asserts that, in any event, the Website Project Manager does not share a sufficient community of interest with Unit employees.

For the reasons set forth below, and based upon the record evidence, I conclude that the Website Project Manager is an employee who shares a community of interest with other unit employees and that the disputed position should be included in the unit. In so determining, I find that the Website Project Manager is not a supervisor within the meaning of the Act, as the evidence fails to establish the position possesses any primary indicia of supervisory status. Further, I find that Website Project Manager is not a managerial employee, as the position does not satisfy any of the considerations that would confer managerial status on her.

Accordingly, upon the entire record in the proceeding, I find:

1. The hearing officer's rulings made at the hearing a free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

##### 5. FACTS

On October 1, 2001, the Employer was formally notified that it had been awarded the Live Justice Project, a project created and funded by the United States Department of Commerce, Technology Opportunities Program. The purpose of the Technology Opportunities Program, and the Project, is to explore innovative uses of technology to deliver legal services using the Internet. The Project would create attorney/client relationships whereby the legal staff, using the Internet, could communicate with clients and prepare legal documents, such as pleadings. The Project is designed to allow more detailed information and assistance to be provided to clients. It is designed to improve timeliness, increase quality, and reduce the cost for providing legal services to low income tenants. The emphasis and focus of Live Justice is landlord/tenant law.

The goal of Live Justice,<sup>3</sup> as stated in the project application that was developed and written by Robert A. Nasdor, the Executive Director, is to develop an interactive website designed to provide low-income tenants facing eviction or living in substandard housing with ready access to legal assistance. Through the application of "e-commerce" technology to the delivery of legal services to low income tenants, Live Justice is designed to preserve tenancies and to improve living conditions of the Employer's constituency. Through Live Justice, tenants and social services

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<sup>3</sup> When initially applied for, the program was known as Access2justice.net. It subsequently changed its name to Live Justice.

agencies can engage in an online consultation with an attorney or trained paralegal who will provide live legal assistance on line.

The project application further indicates that the Employer will contract with NUASIS Corporation,<sup>4</sup> an application service provider, to deliver Cisco's Web Collaboration Server as a hosted service. In addition, the application states that the Employer will work with the Massachusetts Law Reform Institute, which will adapt and expand its sourcebook for use by the Employer, and Neighborhood Legal Services, which will adapt and expand its website capabilities for use by the Employer. The Employer is also working with Worcester Polytechnic Institute to determine if the new medium is appropriate for the delivery of legal services. In this regard, two faculty members of the Institute will evaluate the project's development and implementation. The purpose of the grant by the Department of Commerce is to test and evaluate the concept of legal assistance being delivered over the Internet.

On November 13, 2001, Maya D. Bazar was hired by Nasdor to be the Website Project Manager. The Website Project Manager is generally responsible to develop, implement, maintain, and supervise an interactive website. The job description requires, among other things, that the incumbent write and edit legal content for the website to provide legal information and advice over the Internet, design the website, organize and edit content from licensed materials and other legal service providers, develop marketing material, work with project evaluators, act as a resource for other staff, and conduct education programs for staff and community agencies. In addition, the job description states that the position will provide direct supervision to attorney and paralegal staff who provide real-time web collaboration and chat sessions with income eligible clients and recommend to the Executive Director personnel to work on the project. The job description requires that the position conduct, at least annually, performance evaluations for attorneys and paralegals assigned to the project, including identification of areas in need of improvement. It also requires that the incumbent, when necessary, implement provisions of the collective-bargaining agreement regarding discipline.

The Executive Director, who reports to a Board of Directors, supervises Bazar. In addition, the Executive Director is responsible for working jointly with the Website Project Manager in negotiating contracts with application service providers and web designers. While the Website Project Manager is involved in developing the technology and structure of the program and will make recommendations, the Executive Director remains responsible for making the major decisions concerning this. In fact, during the 36-month grant period, the Executive Director will spend approximately 20 percent of his time working on the Project. In addition, Faye Rachlin, a senior attorney and member of the bargaining unit, is required to spend 20 percent of her time working on the Project;<sup>5</sup> she will assist in the substantive editing of the Project's contents, identifying legal topics and dealing with the substantive accuracy of the Project's legal information. Bazar is a member of the Massachusetts Bar and has extensive experience in writing and editing content and legal services in Internet applications in the area of housing law, but she has never practiced housing and tenant law. While the Project grant funds the salary of the Website Project Manager, it does not pay for the actual delivery of professional services or, it appears, the compensation of either the Executive Director or the senior attorney.

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<sup>4</sup> The Employer, however, decided to contract with ASPS, another service provider.

<sup>5</sup> The grant application actually committed the involvement of a senior attorney in the Project.

After being hired, Bazar was involved in selecting and negotiating a contract and setting up the system with ASPS. In this regard, she worked with the Executive Director, who reviewed the contracts that were negotiated; brought them to the Executive Board; and, after approval, signed them for the Employer. She and Nasdor, working together, developed criteria for hiring a technical consultant. No technical consultant has been hired, however, as Bazar is still in the process of reviewing resumes. After this review, Bazar will make recommendations to Nasdor concerning the technical consultant position. She wrote up specifications for, and is receiving bids from, a site designer; and she will, at some point, make a recommendation to Nasdor. She, along with Rachlin, is working with Neighborhood Legal Services, the agency that is developing the contents of the website. They are developing the question-and-answer documents that will be incorporated into the web content. Bazar is not developing all of the material. There are outside practitioners, experienced in the area, who are writing and reviewing some materials.

When the system is in place, the Housing Unit legal staff will provide legal assistance on line.<sup>6</sup> As designed, it is anticipated that an intake paralegal will be the first point of contact for a client seeking legal help over the Internet. If the intake paralegal is not able to address the needs of the client and answer the questions asked using materials that have been prepared, the contact could be referred to a staff attorney. The Employer filled the intake paralegal position by offering it to Liza Biaz in early March 2002.<sup>7</sup> Using a Unit employee job description that was prepared by Susan Meadler, the Deputy Director, the Executive Director hired an internal candidate. The Website Project Manager was not involved in the hiring process. Because the intake paralegal has no experience in the area of housing and tenant law, she will at some point be trained and mentored by Rachlin.<sup>8</sup>

The Website Project Manager's job description states that the position will supervise and coordinate the legal work of the staff attorneys and paralegals assigned to the project, but the scope of these duties, as developed in the record, is not clear. It appears that Bazar will only assist and mentor the attorneys in the use of the system. Because use of the Internet will be incidental to the job duties of the attorneys in the Housing Unit, the Website Project Manager will only make performance recommendations to the Litigation Director, who is responsible for their supervision. These recommendations will only concern how the legal staff in the Housing Unit is using the Internet programs. There was testimony that Bazar will supervise the intake paralegal. Because the paralegal's duties concern the Internet system, Bazar will be responsible for evaluating the paralegal's performance in this area. It is not clear however, who will be evaluating the paralegal with regard to her provision of legal advice to clients. Further, it is not anticipated that the program will be operational until at least July 2002, and, thus, any coordination or supervision will not occur until sometime thereafter. The job description also states that the Website Project Manager will recommend to the Executive Director personnel to work on the project. The evidence indicates, however, that the Housing Unit staff will work on the project and that involvement appears controlled by the scope of the Project grant.

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<sup>6</sup> The Live Justice Project will involve the Employer's existing Housing Unit legal staff.

<sup>7</sup> The intake paralegal has not assumed the intake paralegal position and will not do so until her former receptionist position is filled.

<sup>8</sup> Beyond the creation of the intake paralegal position, there is no evidence that the Employer will expand the Housing Unit staff to fulfill any of the requirements of the Live Justice Project.

While the Website Project Manager's job description states that she will implement provisions of the collective-bargaining agreement regarding discipline, the record contains no other evidence concerning the Manager's authority in this area. Moreover, it appears that the Executive Director independently investigates any recommendation for discipline, and there is no evidence that the Website Project Manager has recommended that any Unit employee be disciplined.

Bazar is salaried, with her annual compensation falling within the salary parameters of Unit employees. Her starting salary is, however, significantly higher than the starting salary of most attorneys'. She shares the same benefits as all employees, including bargaining-unit employees. She has an office that is physically located with the Housing Unit employees; it is immediately adjacent to Rachlin's office.

## 6. DISCUSSION

Unit clarification is appropriate for resolving disputes concerning the unit placement of employees who come within newly established job classifications or whose duties and responsibilities have undergone recent substantial changes that create real doubt as to whether their positions continue to fall in the category -- excluded or included -- that they occupied in the past. Massachusetts Teachers Assn.<sup>9</sup> As the Website Project Manager's position is newly created, the placement of this position is appropriately before me. Initially, I will consider the questions of whether, as Website Project Manager, Bazar is either a supervisor or a manager under the Act and should, therefore, be excluded from the Unit. As the record fails to establish either supervisory or managerial status, for the reasons set forth below, I will then consider whether a community of interest exists between the Website Project Manager and the attorneys and paralegals in the Unit.

Under Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. See KGW-TV.<sup>10</sup> The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. New Fern Restorium Co.<sup>11</sup> An employee does not become a supervisor simply because the employee has greater skills and job responsibilities than fellow employees. New York University Medical Center.<sup>12</sup> The burden of proving supervisory status rests on the party alleging that such status exists. Tucson Gas & Electric Co.<sup>13</sup> The Board will refrain

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<sup>9</sup> 236 NLRB 1427, 1429 (1978).

<sup>10</sup> 329 NLRB 378, 381 (1999).

<sup>11</sup> 175 NLRB 871 (1969).

<sup>12</sup> 324 NLRB 887, 907 (1997)

<sup>13</sup> 241 NLRB 181 (1979).

from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co.<sup>14</sup>

The Employer asserts that the Website Project Manager is a statutory supervisor by virtue of her power to evaluate and responsibly direct employees. In this regard, the Employer relies on the duties enumerated in the job description of the Website Project Manager. The Employer also relies on the Website Project Manager's training of employees to establish that she is a supervisor within the meaning of the Act.

The record establishes that Bazar has not performed evaluations on any Unit employee or the intake paralegal. Rather, it appears that the program being developed will not become operational until July 2002, at the earliest. In addition, once Bazar evaluates employees, it is not clear how the Director of Litigation or the Managing Attorney will use Bazar's evaluations or what the purpose or effect of the evaluations will be. There is no evidence that the evaluations will have any effect on any employee's terms and conditions of employment. The Board has consistently held that the ability to evaluate employees, without more, fails to establish supervisory authority. Bozeman Deaconess Hospital;<sup>15</sup> Harbor City Volunteer Ambulance Squad;<sup>16</sup> and Passavant Health Center.<sup>17</sup> Although the job description suggests that the Website Project Manager will discipline employees based on the provisions of the collective-bargaining agreement, the record establishes that ordinarily the Executive Director independently investigates such recommendations. In addition, there is no record evidence that Bazar has recommended that any Unit employee be disciplined.

The Website Project Manager states that the position will have certain supervisory responsibilities. Initially, I note that Bazar testified that, in spite of the job description, she assumed she would supervise the intake paralegal. However, other than the job description, there is no evidence that she had been told that she would supervise employees.<sup>18</sup> See generally Sears, Roebuck & Co.<sup>19</sup> (conclusionary statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority.) In addition, there is no evidence that Bazar has ever supervised employees.

The testimony regarding the potential for Bazar to train other employees in the Housing Unit establishes only that Bazar is more knowledgeable in Internet processes. In this regard, Bazar's resume establishes expertise in the field. However, there is no evidence to indicate that, in

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<sup>14</sup> 308 NLRB 101, 102 (1992).

<sup>15</sup> 322 NLRB 1107, 1116 (1997).

<sup>16</sup> 318 NLRB 764 (1995).

<sup>17</sup> 284 NLRB 887, 891 (1987).

<sup>18</sup> The job description of the Website Project Manager is not dispositive of the issue. The grant of authority on paper that is illusory in practice is not sufficient to confer supervisory status. See Beverly Health and Rehabilitation Services, 335 NLRB No.54, slip op., ALJD at 36 (Aug. 27, 2001). The record simply does not establish that, in practice, the Website Project Manager will have and exercise the authority the position description purports to assign her.

<sup>19</sup> 304 NLRB 193 (1991).

performing these functions, Bazar exercises or will exercise any supervisory authority over the employees with whom she works or will work. This does not establish supervisory status. Hexacomb Corp.<sup>20</sup> Moreover, the evidence was insufficient to establish that Bazar will use independent judgment in the training of Housing Unit employees.

Based on the record evidence, I do not find Bazar to be a supervisor within the meaning of the Act.

Employees will be excluded from the unit as managerial employees if they formulate and effectuate management policies by expressing and making operative decisions of their employer or have discretion in the performance of their jobs independent of the employer's established policy. NLRB v. Bell Aerospace Co.;<sup>21</sup> Reading Eagle Co.;<sup>22</sup> Ohio River Co.<sup>23</sup> They must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management's interest by taking or recommending discretionary actions that effectively control or implement employer policy. NLRB v. Yeshiva University.<sup>24</sup>

Here, the record is devoid of references to Employer policy; and, accordingly, there is no basis upon which to find that Bazar takes or recommends discretionary actions that control or implement Employer policy. The record establishes, however, that Bazar is working within the parameters of the Live Justice grant and is attempting to identify service providers and design a web capability. Although she has made recommendations relative to the Project, the Executive Director makes the decisions. In this regard, it is not clear how many recommendations Bazar has made and what deference the Executive Director gives them.

As in Neighborhood Legal Services,<sup>25</sup> it would appear that only the Executive Director or, ultimately, the Board of Directors has the authority to formulate, determine, and effectuate management policies. Although her views and ideas are solicited, Bazar plays "at best an informational or professional advisory role" regarding formulating, determining, and effectuating management policies. Based on the record evidence, I do not find Bazar to be a managerial employee within the meaning of the Act.

Inasmuch as I have found that the Website Project Manager is neither a managerial employee nor a supervisor within the meaning of the Act, the issue remains whether or not it is appropriate for the Petitioner to accrete the position of Website Project Manager into the bargaining unit. Unit clarification is appropriate for resolving, inter alia, ambiguities concerning the unit

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<sup>20</sup> 313 NLRB 983, 984 (1994).

<sup>21</sup> 416 U.S. 267 (1974).

<sup>22</sup> 306 NLRB 871 (1992).

<sup>23</sup> 303 NLRB 696, 714 (1991).

<sup>24</sup> 444 U.S. 672, 682-683 (1980).

<sup>25</sup> 236 NLRB 1269, 1273 (1978).

placement of individuals who come within a newly established classification. Union Electric Co.<sup>26</sup> In determining whether to grant a petition for unit clarification grounded on accretion, the Board examines whether the employees sought to be accreted not only possess a community of interest with the unit employees, but also lack a distinct identity that would warrant placing them in a separate unit. KMBZ/KMBR Radio.<sup>27</sup> Because the process of accretion does not afford affected employees the opportunity to vote for or against representation, the Board follows a restrictive policy in its application. Dennison Mfg. Co.<sup>28</sup> It will find a valid accretion “only when the additional employees have little or no separate group identity...and when the additional employees share an overwhelming community of interest with the pre-existing unit to which they are accreted.” Staten Island University Hospital.<sup>29</sup>

I find that accretion is appropriate in this instance. First, the position of Website Project Manager was newly created after the parties entered into their last collective-bargaining agreement. Second, the disputed position shares an overwhelming community of interest with the bargaining-unit employees. Bazar’s duties are closely associated with those of the Housing Unit employees, who are in the Unit, and Bazar has, to some extent, worked with these employees. She is physically located with the Housing Unit employees. Further, it is projected that when the Project is running, she will work more closely with these employees.

Bazar is within the wage rate of Unit employees and shares other similar benefits and working conditions with other Unit employees. Finally, it appears that Bazar is the only unrepresented nonsupervisory and nonmanagerial professional employed by the Employer. Because the Board does not permit bargaining units consisting of one employee, Bazar would have no option to be represented in another unit were she not included in this one.

Accordingly, I find that the disputed position should be included in the Unit, as requested.

### **CLARIFICATION**

**IT IS HEREBY ORDERED** that the collective-bargaining unit represented by the Petitioner is clarified to include the position of Website Project Manager.

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<sup>26</sup> 217 NLRB 666, 667 (1975).

<sup>27</sup> 290 NLRB 459, 460 (1988).

<sup>28</sup> 296 NLRB 1034, 1036 (1989), citing Compact Video Services, 284 NLRB 117, 118 (1987).

<sup>29</sup> 308 NLRB 58, 61 (1992), citing Safeway Stores, 256 NLRB 918 (1981).



### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by July 8, 2002.

/s/ Rosemary Pye  
Rosemary Pye, Regional Director  
First Region  
National Labor Relations Board  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, Sixth Floor  
Boston, MA 02222-1072

Dated at Boston, Massachusetts  
this 24th day of June, 2002.

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